IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

THOMAS D. ARTHUR,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 2:07-cv-319-WKW
	)	
TROY KING, *et al.*,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Thomas D. Arthur is an inmate convicted of capital murder and sentenced to death. Arthur brings this § 1983 complaint against Troy King, the Attorney General for the State of Alabama; Bryce U. Graham, Jr., the district attorney for Colbert County, Alabama; Ronnie May, sheriff for Colbert County, Alabama; and M. David Barber, the district attorney for Jefferson County, Alabama (collectively the "defendants"), to receive access to specific material collected at the crime scene for DNA and other testing. On May 18, 2007, the defendants filed a Motion to Dismiss (Doc. # 8) pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, the court will GRANT the defendants' Motion to Dismiss.

I. FACTS AND PROCEDURAL HISTORY

A. Facts

Arthur was convicted and sentenced to death for the February 1, 1982 murder of Troy Wicker ("Troy"). It is relevant to Arthur's Section 1983 complaint to briefly discuss the evidence presented at his December 5, 1991 trial.[1]

On February 1, 1982, police officers found Troy's body in his Muscle Shoals home with a gunshot wound to his right eye. At the scene were an injured Judy Wicker ("Judy"), Troy's wife, and Teresa Rowland ("Teresa"), Judy's sister. Judy was taken to the hospital where a rape kit was prepared. An investigator with the police department later questioned Judy at the hospital regarding her husband's murder. She stated that an African-American man burglarized her home, raped her, knocked her unconscious, and shot her husband. The police gathered various pieces of evidence at the crime scene, including Judy's clothing, vacuum sweepings, a hair sample, spent gun cartridges, a pillowcase, and fingerprints. Officers later discovered Judy's 1981 Buick Riviera in an abandoned lot and recovered a wig, hair samples, and fingerprints from the car.

The police investigated Judy for the murder of her husband and concluded that she paid Arthur to

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[1] The opinion of the Alabama Court of Criminal Appeals in *Arthur v. State*, 711 So. 2d 1031 (Ala. Crim. App. 1996), contains an in-depth reiteration of the evidence in Arthur's trial.

murder Troy to collect the proceeds of a $90,000 life insurance policy. At her trial for murder, she maintained her innocence, and her testimony concerning the intruder was consistent with that given to the investigator. The jury disbelieved her testimony, and she was convicted of murder and sentenced to life in prison. However, at each of Arthur's three trials, Judy testified that she hired Arthur to kill her husband, providing detailed testimony about Arthur's role in the murder. She stated that she began to converse with Teresa about killing Troy in early 1981. Theron McKinney ("Theron"), Teresa's husband, was also party to these conversations. Judy acknowledged that she had known Arthur from her days of working at Tidwell Homes, and they had been having sexual relations. On the day of the murder, Judy dropped off her sons at school and twice drove across Avalon Avenue. Judy then met Teresa and Arthur at the airport. Judy testified that Arthur had blackened his face and was wearing a wig so as to look like an African-American. Further, Arthur had a gun and was carrying a garbage bag. All three individuals concocted a plan in which Judy would say that her home had been burglarized and she was assaulted by a black man. After her husband was murdered, Judy paid Arthur $10,000 and Teresa $6,000, and provided jewelry and an automobile to Theron for his role in the plan. Arthur alleges the prosecutor agreed to put in a good word with the parole board if Judy would offer helpful testimony in Arthur's trial.

In addition to Judy, the State of Alabama offered the testimony of thirteen witnesses at Arthur's third trial. Sergeant Eddie Lang, a Muscle Shoals police officer, testified that he observed Judy passing

Avalon Avenue twice on the day of the murder. Joseph Wallace testified about his observations of the crime scene and the items that were recovered from the Buick. Debra Tynes testified that Arthur was late for a lunch appointment with her on the day of the murder. Later that day, Tynes and Arthur drove across the Tennessee River Bridge. Tynes testified that Arthur stopped the car and threw a plain black garbage bag wrapped in a sheet into the river. Arthur stated, "I want to get rid of some old memories." *Arthur v. State*, 711 So. 2d 1031, 1044 (Ala. Crim. App. 1996). Talmadge Sterling and Pat Halliday, respectively a correctional officer and an employee of the Decatur Work Release Center, both testified as to Arthur's residency at the Center. Sterling stated that Arthur clocked out for work at 6:00 a.m., on the morning of the murder. At 7:10 p.m., Arthur called for a ride back, and at 7:50 p.m. he returned to the Center. Arthur was assigned through the Center to work at Reagan Mobile Homes, but owner Joel Reagan testified that he did not know of Arthur's whereabouts on the day of the murder.

Halliday testified about a subsequent discrepancy in Arthur's payroll records resulting in Arthur being transferred to the Morgan County Jail. On inspection of his effects, officers at the Morgan County Jail found twenty one hundred dollar bills in his coat pocket. Pat Yarbrough Green, an employee at Cher's Lounge, testified that she knew Arthur because he frequented the lounge. On the day before the murder, Green stated that Arthur asked her if she could obtain .22 caliber long rifle bullets for him. Green asked a third party to obtain the bullets, and Arthur paid her ten dollars when she delivered the

bullets to him. Green also testified that Arthur told her that "[s]omeone will be killed in Tennessee. Don't worry, it won't be traced to us." *Arthur*, 711 So. 2d at 1044. Arthur also asked Green if she could get him some "jars" or "knockout pills." *Id.* Brent Wheeler, a forensic scientist, testified that the bullet found in Troy's body was a .22 long rifle bullet. Moreover, he stated that the spent casings were .22 long rifle. Dr. Pirl, a toxicologist, stated that there was neither ethanol nor narcotics in Troy's body. However, he stated that there could have been, although he was unsure, a drug called scopolamine in Troy's system at the time of his death. Scopolamine is commonly referred to as "juars" or "jars." *Id.* at 1051.

At Arthur's insistence, Arthur represented himself at the third trial, with attorney Henry Walden and Walden's son as co-defense counsel.[2] The team called four witnesses. Ronald Spears, an inmate at West Jefferson prison, testified that Green told him that "[t]he cops told me to lie on Tommy re[garding] the .22 bullets." *Id.* at 1045. Arthur offered inconsistent explanations for the cash found in his pocket after the murder. Bruce Carrol, an inmate at St. Clair prison, testified that he lost $6,500 to Arthur in a poker game. Gene Moon, a resident of Cullman County Jail, stated that an inmate gave him $2000, and Moon slipped it in the coat pocket of Arthur.

At the conclusion of the case, the jury convicted Arthur of the murder of Troy. Arthur's crime was considered "capital because he had previously been

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[2] This was a sort of "hybrid representation," as described by the Alabama Court of Criminal Appeals. *Arthur*, 711 So. 2d at 1045.

convicted of murder in the second degree in 1977 . . . and . . . for intentionally causing the death of Troy Wicker by shooting him with a pistol for pecuniary or other valuable consideration . . . ." *Id.* at 1043 (internal citations omitted). At the sentencing phase of Arthur's trial, Walden asked the jury to sentence Arthur to life in prison. However, Arthur followed Walden and asked the jury to sentence him to death. The jury, by a vote of 11-1, sentenced Arthur to death for Troy's murder. The conviction and death sentence were affirmed by the Alabama Supreme Court in 1997. *See Ex parte Arthur*, 711 So. 2d 1097 (Ala. 1997).[3]

B. Procedural History

February 1, 1982:	Troy Wicker found murdered at his Muscle Shoals Home.
February, 1982:	Arthur was convicted of murder and sentenced to death.
May 10, 1985:	The Alabama Supreme Court reversed Arthur's first conviction. *Ex parte Arthur*, 472 So. 2d 665 (Ala. 1985).
May 13, 1987:	Arthur was convicted again of murder and

[3] This was Arthur's third conviction for Troy's murder, and his third death sentence.

sentenced to death.

May 25, 1990: The Alabama Court of Criminal Appeals reversed Arthur's second conviction. *Arthur v. State*, 575 So. 2d 1165 (Ala. Crim. App. 1990).

December 5, 1991: Arthur's third trial resulted in another guilty verdict and recommendation of death.

January 24, 1992: The trial court sentenced Arthur to death.

March 8, 1996: The Alabama Court of Criminal Appeals affirmed Arthur's conviction and death sentence. *Arthur v. State*, 711 So. 2d 1031 (Ala. Crim. App. 1996).

November 21, 1997: The Alabama Supreme Court affirmed the Court of Criminal Appeals' decision. *Ex parte Arthur*, 711 So. 2d 1097 (Ala. 1997).

January 25, 2001: Arthur filed a Rule 32 Petition in the Circuit Court of Jefferson

	County, Alabama.
March 5, 2001:	The Circuit Court of Jefferson County dismissed the Rule 32 petition as being untimely.
March 23, 2001:	The Alabama Supreme Court set April 27, 2001, as Arthur's execution date.
March 28, 2001:	Arthur filed a motion to reconsider the denial of his Rule 32 motion.
April 20, 2001:	Arthur filed his Petition for Writ of Habeas Corpus and motion to stay the execution in the Northern District of Alabama.
April 25, 2001:	The Northern District of Alabama stayed the execution date.
April 25, 2001:	The Alabama Court of Criminal Appeals affirmed the denial of Arthur's Rule 32 petition. *Arthur v. State*, 820 So. 2d 886 (Ala. Crim. App. 2001).

November 2, 2001:	The Alabama Supreme Court denied certiorari on the Rule 32 petition.
May 13, 2002:	The United States Supreme Court denied certiorari on the Rule 32 petition.
December 4, 2002:	Judge Edwin Nelson of the United States District Court for the Northern District of Alabama denied Arthur's Habeas petition as being untimely.
December 18, 2002:	Arthur filed a motion for reconsideration of Judge Nelson's denial.
June 5, 2003:	Judge Scott Coogler of the United States District Court for the Northern District of Alabama denied Arthur's motion for reconsideration.
August 6, 2003:	Arthur filed a motion for a certificate of appealability.
August 11, 2003:	The United States District Court for the Northern District of

	Alabama granted Arthur's certificate of appealability.
June 21, 2006:	The Eleventh Circuit affirmed the district court's denial of Arthur's habeas petition. *Arthur v. Allen*, 452 F.3d 1234 (11th Cir. 2006).
August 14, 2006:	The Eleventh Circuit modified its June 21, 2006 opinion. *Arthur v. Allen*, 459 F.3d 1310 (11th Cir. 2006).
April 12, 2007:	Arthur filed the instant § 1983 complaint seeking access to various pieces of evidence to have it tested for DNA and other testing.
April 16, 2007:	The United States Supreme Court denied certiorari in *Arthur v. Allen*, 459 F.3d 1310 (11th Cir. 2006).
June 22, 2007:	The Alabama Supreme Court set Arthur's execution date for September 27, 2007.

II. STANDARD FOR DISMISSAL

A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint against the legal standard set forth in Rule 8: " a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Dismissal of an unnecessarily delayed § 1983 action by a death row inmate can be an appropriate remedy. *See Grayson v. Allen*, __ F.3d __, No.07-12364, 2007 WL 2027903 (11th Cir. July 16, 2007).

III. DISCUSSION

On April 12, 2007, over fifteen years after his third conviction for the capital murder of Troy, Arthur filed this § 1983 action seeking access to biological and other evidence used at trial. Arthur's complaint alleges that the failure or refusal of the defendants to provide the evidence he requests is a violation of his Fourteenth Amendment right to due process, his Eighth Amendment right not to be subjected to cruel and unusual punishment, his right to access to the courts, and his clemency rights. Defendants argue that Arthur's § 1983 complaint should be dismissed for a variety of reasons, including that he has no constitutional right to post-conviction DNA testing, that his claim is barred by the two year statute of limitations and that his claim is barred by laches. Arthur's execution date is set for September 27, 2007, which raises the issue of whether the merits of this case can be fully litigated without the entry of a stay of execution. The consideration of Arthur's right to a stay in order to

fully adjudicate the merits of his claim disposes of the motion before the court.[4]

The considerations surrounding the granting of a stay of execution in § 1983 cases are well and recently established in the Eleventh Circuit. This is an equitable exercise. "[W]here petitioner's scheduled execution is imminent, there is no practical difference between denying a stay on equitable grounds and denying injunctive relief on equitable grounds in a § 1983 lawsuit." *Rutherford v. Crosby*, 438 F. 3d 1087, 1092 (11th Cir. 2006) (*Rutherford I*), *vacated on other grounds, Rutherford v. McDonough*, __ U.S. __, 126 S. Ct. 2915 (2006) (mem.).[5] "[T]here is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* at 1090-91 (citation omitted). The Supreme Court recognized that federal courts "have invoked their equitable powers to dismiss [§ 1983] suits they saw as speculative or filed too late in the day." *Hill v. McDonough*, __ U.S. __, 126 S. Ct. 2096, 2104 (2006). "While the Supreme Court did not pass judgment on these § 1983 cases, it recognized the 'significant' problem created by such delay and stated that 'federal courts can and should protect States from

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[4] Because the court has determined that Arthur is not entitled to a stay of execution to litigate his claims, the court need not address the merits of the defenses of statute of limitations and laches.

[5] *Rutherford* was a challenge to the method of execution case. In the analysis of equitable considerations, the court finds no logical or precedential reason to treat a § 1983 request for injunctive relief for purposes of DNA or other testing any differently than a § 1983 challenge to the method of execution.

dilatory or speculative suits . . . .'" *Grayson*, 2007 WL 2027903, at * 3 (quoting *Hill*, 126 S. Ct. at 2101). "[B]efore granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). As will be seen, Arthur's request cannot be litigated without entry of a stay of execution. Arthur fails to overcome the strong equitable presumption against the grant of a stay.[6]

Nine weeks after this action was filed, the Alabama Supreme Court set Arthur's execution date for September 26, 2007. Although Arthur has not requested a stay of execution, he also has not

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[6] In two recent decisions in this district, death row inmates filed their respective § 1983 complaints alleging that Alabama's method of execution is unconstitutional. *Jones v. Allen*, 483 F. Supp. 2d 1142 (M.D. Ala. 2007), *aff'd* 485 F.3d 635 (11th Cir. 2007); *Grayson v. Allen*, No. 2:06-cv-1032-WKW, 2007 WL 1491009 (M.D. Ala. May 21, 2007), *aff'd* __ F.3d __, No. 07-12364 (11th Cir. July 16, 2007). In *Jones*, Judge Myron Thompson denied an inmate's motion to stay his execution because he was dilatory in bringing his challenge. 483 F. Supp. 2d 1142. The inmate filed his complaint "nearly 28 years after he was first found guilty of capital murder and sentenced to death . . . [and] six years after he filed his habeas petition . . ." *Id.* at 1152. In *Grayson*, this court found that an inmate who waited twenty-five years after he was first found guilty and ten years after filing his habeas petition was dilatory in bringing his claim. 2007 WL 1491009. Although the decision to grant a stay is not strictly a comparison of delays in other cases, it is the duty of the court to ascertain whether Arthur has been dilatory in filing his § 1983 claim for post-conviction access to DNA and other testing, and in view of his delay, whether he can establish that a stay is warranted.

requested expedited action on his complaint. His complaint comes late in the litigation day, after the exhaustion, over the span of twenty-five years, of all state and federal avenues of relief, including direct appeal (two of which successfully resulted in reversals and new trials) and collateral appeal in state court, and a habeas action in federal court, just concluded in August 2006. In this circuit, consideration of the merits of a § 1983 action brought by a death row inmate means full adjudication, entailing a sufficient period to conduct discovery, depose experts, and litigate the issues on the merits, including any appeals. *Jones v. Allen*, 483 F. Supp. 2d at 1152. "Where full adjudication is not possible, the result is either a stay or an execution." *Grayson*, 2007 WL 1491009, at * 4. As will be seen, there is no guaranteed right to trial evidence for DNA testing in this circuit for an inmate in Arthur's procedural posture. Even though Arthur requests only injunctive relief (Compl. ¶ 10), the court finds, for reasons that appear below, that it would take many more months, if not years, to fully litigate this claim in its present posture.[7] A stay of execution is therefore implicated, and the court will address the equitable considerations raised: Arthur's likelihood of success on the merits, the relative harm to the parties, and the delay in bringing the action.

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[7] At the habeas stage, which included the same issue raised in this § 1983 action, Arthur's case required five years for resolution in the district and circuit courts.

A. Likelihood of Success

Arthur cannot demonstrate a substantial likelihood of success on the merits in his DNA and other testing claim. He has not demonstrated that he has a constitutional right to such testing in the circumstances presented here, and his claim to such testing has been previously considered by other courts and rejected. Each of the constitutional grounds advanced by Arthur will be examined in turn, followed by a review of the actions of other courts on Arthur's previous request for access to the same evidence requested here.

1. Due Process Right to DNA Testing

The defendants argue that Arthur has no procedural or substantive due process right to post-conviction DNA testing pursuant to the Eleventh Circuit's opinion in *Grayson v. King*, 460 F.3d 1328 (11th Cir. 2006), and that such claim should be summarily dismissed. Arthur responds that his is an extraordinary case and is distinguishable from the facts of *Grayson*. Moreover, Arthur avers he has more than adequately stated a claim under both *Brady v. Maryland*, 373 U.S. 83 (1963), and *Mathews v. Eldridge*, 424 U.S. 319 (1976). The court finds that Arthur's case is not so extraordinary as to fall outside the holding of *Grayson*, and, similarly, that he does not have a due process right to post-conviction DNA testing under *Brady* or the balancing test of *Mathews*.

a. Brady v. Maryland

The Eleventh Circuit, in interpreting *Brady*, has held that "[t]he *Brady* rule is grounded in a defendant's right to a fair trial." *Grayson*, 460 F.3d at 1337. The cornerstone question of a *Brady* violation is whether the prosecution withheld material evidence from the defense. *See Brady*, 373 U.S. at 87. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

In *Grayson*, the Eleventh Circuit held that a death row inmate did not have a due process right under *Brady* to obtain evidence, post-conviction, for DNA testing. Darrell Grayson and Victor Kennedy burglarized the home of Mrs. Annie Laura Orr, repeatedly raped her, and suffocated her with a pillowcase. Grayson filed a § 1983 complaint asking for DNA evidence pursuant to *Brady* and its progeny. The Eleventh Circuit held that Grayson did not have a post-conviction right to DNA testing. The crux of the Eleventh Circuit's holding was that Grayson made no argument that the alleged exculpatory evidence was suppressed at trial; he had freely admitted his guilt as to his role in the crime; the DNA testing would not exonerate him, even if it produced a favorable result; and there was overwhelming evidence, outside of his confession, of Grayson's role in the murder of Mrs. Orr. While the Eleventh Circuit specifically stated that its decision did "not foreclose the possibility that a § 1983

plaintiff could, under some extraordinary circumstances, be entitled to post-conviction access to biological evidence for the purpose of performing DNA testing," *Grayson*, 460 F.3d at 1340, this court does not find that Arthur's case is one of those with extraordinary circumstances to which the Eleventh Circuit alludes.

First, like Grayson, Arthur does not argue that the evidence he wishes to test for DNA was suppressed by the prosecution, either in bad or good faith, at his trial. On the contrary, the evidence, according to Arthur's complaint, was submitted by the prosecution to the state forensics lab and some was placed into evidence at the trial. There is no assertion by Arthur that the prosecution ever received a DNA report on the evidence in question and withheld it from the defense. Second, the *Brady* decision is grounded upon a defendant's right to a fair trial, and from a review of the opinions of the Alabama Supreme Court, the Alabama Court of Criminal Appeals, the Northern District of Alabama, and the Eleventh Circuit Court of Appeals, all of which analyzed the evidence submitted at the third trial, there is no reason to conclude that there was a *Brady* violation resulting in an unfair trial. Third, there was overwhelming evidence linking Arthur to Troy's murder. Although she was the prosecution's most important witness, Judy was not the only witness that the jury heard. Thirteen witnesses testified for the State, many of whom corroborated Judy's testimony. Various witnesses testified to events outside of Judy's testimony that implicated Arthur in Troy's murder. Of particular interest is the testimony that twenty one hundred dollar bills were found in Arthur's coat pocket after Troy's

murder; that Tynes observed Arthur throw a garbage bag into the Tennessee River on the day of the murder in order to "get rid of some old memories;" that Green obtained .22 long rifle bullets for Arthur on the day before the murder; that Arthur told Green that someone would be murdered; that the bullet found in Troy's body and the shell casings found at the scene were from .22 long rifle bullets; and that Reagan could not testify as to the whereabouts of Arthur on the day of Troy's murder. Even though these and other witnesses recalled various events involving Arthur on the day of and days leading up to the murder, he maintains that no direct evidence was ever discovered that directly placed him at Troy's murder. This argument fails because direct evidence is not necessary for prosecution and conviction; circumstantial evidence is sufficient. *See Hallford v. Culliver*, 459 F.3d 1193, 1201 (11th Cir. 2006) (citing *McMillian v. State*, 594 So. 2d 1253, 1263 (Ala. Crim. App. 1991)).

Fourth, like Grayson, Arthur cannot establish that DNA testing, even if the testing results in a favorable outcome, will exonerate him of murder. In his reply brief, Arthur states that DNA testing "*could* . . . shed light on Mr. Arthur's guilt or innocence by demonstrating that he was nowhere near the Wicker residence on the morning of the murder." (Arthur's Reply Br. at 10 (emphasis added).) Arthur postulates that the DNA evidence "*could* discredit entirely the only direct testimony linking Mr. Arthur to the murder, because Judy Wicker's testimony does not allow for the possibility that two persons killed Troy Wicker." (*Id.* (emphasis added).) However, Arthur's argument ignores the testimony of the other thirteen witnesses who either corroborated Judy's testimony

or offered other incriminating insight into the murder. The best result that Arthur could hope for is that the DNA evidence does not show that he raped or assaulted Judy. Arthur, though, was not convicted of the rape or assault of Judy. The discrediting of Judy's testimony would not exonerate Arthur of Troy's murder or undermine confidence in the conviction of Arthur in view of the evidence otherwise linking him to the murder.[8]

Finally, unlike Grayson, Arthur argues that he has asserted his innocence since his conviction. Although Grayson confessed to the murder of Mrs. Orr, Arthur's assertion of innocence is irrelevant in the analysis of an alleged *Brady* violation. As stated previously, *Brady* speaks only to the suppression of material evidence by the prosecution that, if disclosed, would have undermined confidence in the defendant's conviction. *Brady* is not grounded in whether a defendant asserts his innocence or confesses his guilt.

In sum, Arthur fails to establish a due process basis for his testing claims under *Brady*.

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[8] As discussed *infra*, Judges Nelson and Coogler rendered a detailed analysis of the evidentiary value of any DNA or other testing requested by Arthur in his motion for discovery in the habeas proceeding, item by item, concluding that "Arthur's conjectures about the relevance of the evidence to his claim of actual innocence fall far short of specific allegations showing reasons to believe that the fully developed facts might entitle him to relief." *Arthur v. Haley*, Mem. of Op., No. 01-N-0983, at 5 (N.D. Ala. June 4, 2003) (citation and internal quotation marks omitted).

b. Mathews v. Eldridge

Arthur next argues that he has a procedural due process right to DNA testing under the holding of *Mathews v. Eldridge*, 424 U.S. 319 (1976). Arthur postulates that, absent Judy's testimony, only circumstantial evidence implicated him in the murder of Troy, and that DNA evidence *could* call into question his conviction. Defendants respond that the evidence that Arthur murdered Troy is "overwhelming," and that the State has an interest in the finality of convictions. (Defs.' Reply Br. to Pl.'s Resp. Br. at 11.)

"*Mathews* applies only where an individual has a liberty or property interest that the government seeks to eliminate, and the *Mathews* test concerns the administrative procedures required." *Grayson*, 460 F.3d at 1340.

> [W]here the government seeks to deprive an individual of such an interest, the courts must consider the following factors in determining what administrative safeguards are required: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. (quoting *Mathews*, 424 U.S. at 335).

The *Grayson* court assumed that the inmate had a liberty interest in his life, and rightly so. However, the court affirmed the district court's decision that Grayson did not have a procedural due process right to DNA testing because the second and third *Mathews* factors weighed against him. Similarly, the court acknowledges Arthur's liberty interest in his life but finds that the second and third *Mathews* factors weigh against Arthur in his present complaint.

The second *Mathews* factor – "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" – weighs against Arthur's claim. Arthur has had three trials and three convictions that resulted in death sentences (two convictions were reversed in state court proceedings); state and federal habeas proceedings; and a stay of execution. Arthur has been litigating his convictions for at least twenty-five years; two federal district judges and the Eleventh Circuit weighed the merits of his habeas proceeding; and both the Alabama Court of Criminal Appeals and the Supreme Court of Alabama affirmed his third conviction. The procedural safeguards in place and afforded to Arthur for twenty-five years of litigation are sufficient for the protection of his liberty interest. *See Grayson*, 460 F.3d at 1341 (holding that the procedural safeguards afforded to Grayson were sufficient when "[h]is liberty interest in his life was already litigated extensively for twenty years"). The same procedural safeguards afforded Grayson were exactly those afforded to Arthur.

The inherent value of an additional safeguard, *i.e.* DNA testing, coupled with Arthur's litigation record and the weight of the evidence against him, is small. Arthur seeks only to discredit the veracity of the testimony of Judy with the speculative results of DNA evidence. As stated previously, the circumstantial evidence linking Arthur to Troy's murder is, even if not characterized as overwhelming, more than enough to withstand a favorable DNA result.

The third prong – the government's interest and the burdens of the additional safeguard of DNA testing – also weighs against Arthur's claim. The Eleventh Circuit recognized that the government had "[c]ompelling interests - e.g., guarding against a flood of requests, protecting the finality of convictions, and ensuring closure for victims and survivors," which outweighed Grayson's request for DNA testing of trial evidence. *Id.* at 1342. Arthur argues that the compelling interests of the State are overshadowed by the execution of the innocent. The court agrees with that statement in the hypothetical, but not with its application to Arthur. Arthur has had over fifteen years to litigate this death sentence and to persuade a court to accept his arguments, both about actual innocence and the need to test the evidence he now requests. Arthur now asks this court to overlook the decisions of other courts in their extensive review of his conviction and the review of the very same claims he now makes. The State has significant interests, discussed more fully in subsection III.B., which outweigh those advanced by Arthur. The court concludes that Arthur has no likelihood of success under the *Mathews* analysis.

His due process arguments therefore fail to establish any likelihood of success on the merits.

2. Cruel and Unusual Punishment

Arthur argues that the refusal of the State to provide him with the requested evidence is violative of the Eighth Amendment and constitutes cruel and unusual punishment. The defendants respond that the Eighth Amendment does not apply to requests for DNA tests. The court finds no precedent to suggest that the denial of Arthur's requested evidence is violative of the Eighth Amendment.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend VIII. Neither the United States Supreme Court nor the Eleventh Circuit Court of Appeals has extended the Eighth Amendment's protections against cruel and unusual punishment to DNA testing. Accordingly, the court refuses to singularly extend the Eighth Amendment to Arthur's claim. The court therefore finds no likelihood of success on the final merits on the basis of cruel and unusual punishment arguments.

3. Right of Access to Courts

Arthur claims that his right of access to courts has been violated because the defendants have refused to provide him access to evidence for DNA testing and the results of the testing of the evidence *could* hold the key to his innocence. The State responds by arguing that Arthur's injury is speculative. The court agrees that Arthur has failed to establish a claim under the right of access to courts doctrine.

It is clearly established that under the Fourteenth Amendment a prisoner has "a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). *Bounds* and its progeny forbid the interference by state officials with an inmate's right to state a legal claim and have that claim reviewed by a court. This right, however, like any alleged violation of a constitutional right, has been interpreted to require actual injury to the prisoner. *See Lewis v. Casey*, 518 U.S. 343, 349 (1996) (holding that the actual injury requirement of *Bounds* is derived from the doctrine of standing). Further, "a litigant asserting an access claim must also prove that he has a colorable underlying claim for which he seeks relief. The right is ancillary to the underlying claim. Thus, the plaintiff must identify within his complaint, a "'nonfrivolous,' 'arguable' underlying claim." *Barbour v. Haley*, 471 F.3d 1222, 1226 (11th Cir. 2006) (internal citations omitted).

The fatal flaw in Arthur's argument is that he does not present an underlying claim in which his right of access to courts has been denied. Because the right of access to courts doctrine is secondary to the underlying claim, Arthur must first establish that he has a right to DNA testing before he can claim that state officials interfered with that right. Arthur has not established that he has such a right under any of the legal theories propounded in his complaint. Accordingly, Arthur has failed to establish a likelihood of success under the access to courts doctrine.

4. Clemency

Arthur claims that his right to clemency proceedings will be hampered if he is not granted access to evidence for DNA testing, and that the denial of such evidence renders the clemency process arbitrary and thus a violation of due process afforded by the Fourteenth Amendment. The defendants argue that executive clemency is vested in the Governor without recourse in the courts. The court finds that even if the State denies the requested evidence, Arthur has not shown that clemency proceedings under Alabama's constitutional scheme are violative of the Fourteenth Amendment.

The Alabama Constitution provides: "The governor shall have power to grant reprieves and commutations to persons under sentence of death." Ala. Const. art. V, § 124. Under this Amendment, "only the Governor has the power to grant reprieves and commutations to persons under sentence of death. . . ." *Liddell v. State*, 251 So. 2d 601, 606 (Ala. 1971). Under the due process clause, "some *minimal* procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (plurality opinion) (O'Connor, J., concurring).

Arthur argues that "[d]efendants' refusal to permit Mr. Arthur to access to [sic] the physical evidence within their control and to test that evidence, which is irrefutably pertinent to his

clemency application, renders the clemency process wholly arbitrary . . . ." (Pl.'s Reply Br. to Defs.' Mot. Dismiss at 25.) Arthur, however, does not establish and cannot establish how the denial of the evidence renders the clemency proceedings arbitrary. Arthur is permitted, unlike the hypotheticals offered by Justice O'Connor, to access the clemency process. Arthur further suggests that under Alabama Code § 12-17-184(16), the State has a duty to provide to the Governor all pertinent information at clemency hearings, which Arthur contends includes the requested DNA testing. Arthur interprets the statute more broadly than is required. To sustain Arthur's argument, a DNA test must have been done on the evidence with the results subsequently withheld from the Governor. However, no testing has been done on the evidence to this court's knowledge. Moreover, the Governor, in his discretion in the clemency process, has the executive authority to order DNA testing on the evidence if he deems it pertinent to his decision.

Arthur's clemency argument demonstrates no likelihood of success on the merits of the case.

5. Previous Consideration by Other Courts

In his 2001 habeas petition, Arthur filed a motion for discovery in which he asked for the identical evidence that he seeks in the instant action. Judge Edwin Nelson analyzed Arthur's theory for asking for the discovery, the facts underlying the evidence he sought to test, and the speculation of Arthur that the test results "might support this alternate version of events." *Arthur v. Haley*, Mem. of Op., Dec. 4, 2002, No.CV01-N-0983-S, at 6 (N.D. Ala. Dec. 4,

2002) (Nelson, J). Judge Nelson found that Arthur's claim of actual innocence would not be viable, even if the tests supported Arthur's version of the events surrounding the murder, when viewed under either the "more likely than not" standard or the "clear and convincing" standard. *Id.* Judge Nelson also wrote: "*Isaacs v. Head*, 300 F.3d 1232 (11th Cir. 2002) further indicates that Arthur's request for release of the physical evidence is due to be denied *because he failed to exercise 'due diligence' in pursuing the facts during the state proceedings.*" *Id.* at 7 n.7 (emphasis added). Subsequently, Judge Scott Coogler took up the matter on Arthur's motion to alter or amend Judge Nelson's judgment. Having further analyzed Arthur's claims with respect to each particular piece of evidence sought to be tested by Arthur, Judge Coogler found:

> The physical evidence Arthur seeks to test includes Judy Wicker's bloody clothing, a rape kit created the day of the murder, a wig and hair samples from the Wicker residence, the bullet removed from the victim's body, spent cartridge casings found at the murder scene, and a pillowcase found beneath the victim's head. None of this evidence is new or was unknown to Arthur during the state court proceedings. *Arthur belatedly claims he diligently sought to test this evidence during state court proceedings*, and points to a motion made by counsel at his third trial . . . . A similar one-time request was found to be *insufficient evidence of diligence* in *Williams v. Taylor*, 529 U.S. at 439-40.

Arthur v. Haley, Mem. of Op., No. 01-N-0983, at 5 (N.D. Ala. June 4, 2003) (citation and internal quotation marks omitted) (emphasis added).

On appeal, the findings of the district court were upheld. *Arthur v. Allen*, 452 F.3d 1234 (11th Cir.), modified on reh'g, 459 F.3d 1310 (11th Cir. 2006). Addressing Arthur's entitlement to a hearing and discovery, the Eleventh Circuit held that generally "[a] habeas petitioner is not entitled to discovery as a matter of ordinary course, but [only] . . . upon a showing of good cause to believe that the evidence sought would raise sufficient doubt about [his] guilt to undermine confidence in the result of the trial." *Arthur*, 459 F.3d at 1310 (internal quotation marks and citations omitted.) Further, "good cause for discovery cannot arise from mere speculation" or on "the basis of pure hypothesis. . . ." *Id.* Rejecting the "wounded" affidavits Arthur now again relies upon, the Circuit Court found that Arthur failed to furnish "good cause to believe that the facts, if fully developed through discovery sought [DNA and other testing], would be any different from those found at trial." *Id.*

Thus, two district judges and the Eleventh Circuit (a mere twelve months ago) have already determined as fact that Arthur was not diligent in pursuing the testing of this evidence *before 2002*, and that even if he were to be given the evidence for DNA and other testing, the outcome of his trial would be intact. Arthur has presented no new evidence or other credible reason why this court should ignore the findings of another district court and the very court which will in all likelihood review this opinion.

B. Relative Harm to the Parties

It goes without saying that Arthur faces irreparable harm without a stay of execution. However, irreparable harm is not necessarily harm that is avoidable. In the parlance of equity, the harm may only be avoided by entry of a stay of execution if the considerations in Arthur's favor outweigh the considerations of the State of Alabama in seeing its judgments honored. As noted in *Grayson, Jones, Rutherford, and Nelson*, Arthur's is a heavy burden because of a strong equitable presumption against entry of a stay. Arthur fails to carry this burden for several reasons. First, Arthur has delayed filing this action until his execution is imminent a second time.[9] The first time was his execution date of April 26, 2001, stayed after he filed his habeas petition less than a week before his execution date. This weighs against Arthur when Troy's murder occurred over twenty-five years ago, and Arthur's *third conviction* happened over fifteen years ago. By his unreasonable delay, Arthur "leaves

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[9] The Eleventh Circuit affirmed the denial of Arthur's habeas petition on June 21, 2006, *Arthur v. Allen*, 452 F.3d 1234 (11th Cir. 2006), and modified on August 14, 2006, *Arthur v. Allen*, 459 F.3d 1310 (11th Cir. 2006). Yet Arthur did not file this action until April 12, 2007, nearly ten months after the Eleventh Circuit decided the habeas outcome. Arthur "should have foreseen that the execution date would likely be set promptly upon completion of collateral review." *Jones*, 485 F.3d at 639 n.2. "Waiting to file suit until the Supreme Court has denied *certiorari* review of an inmate's federal habeas petition, or, as Jones did, waiting until a petition for *certiorari* has been pending for over three months, is simply too late to avoid the inevitable need for a stay of execution." *Id.* Like Jones, Arthur waited too long to file.

little doubt that the real purpose behind his claim is to seek a delay of his execution . . . ." *Jones*, 485 F.3d at 640 (quotation marks and citation omitted).

Another factor weighing against Arthur is the likelihood that a stay will result in another reprieve of several years while his request to conduct DNA and other testing is litigated. As noted above, the right to DNA testing is nowhere guaranteed except in extraordinary cases, *Grayson*, 460 F.3d 1339, and this is not one. Arthur has failed to raise other grounds of relief with a substantial likelihood of success. The conclusion is almost inescapable that the only outcome of a stay would be further delay, to the prejudice of the State.

The State would be prejudiced in other ways as well. The State's interest in meting out a sentence of death in a timely manner acquires "an added moral dimension" when post-trial proceedings have run their course. *See Calderon v. Thompson*, 523 U.S. 538, 556 (1988). "To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.* (internal citation and quotation marks omitted). Even a cursory review of Eleventh Circuit precedent affirms this interest. *See, e.g., Jones*, 485 F.3d at 641 ("We will not interfere with the State's strong interest in enforcing its judgment in this case."); *Grayson*, 460 F.3d at 1342 ("[T]he government has a strong interest in the finality of duly adjudicated criminal judgments."); *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir. 1983) ("Each delay, for its span, is a commutation of a death sentence to one of imprisonment."). The court cannot ignore this firmly rooted sentiment.

The injunctive relief Arthur seeks in this lawsuit is merely temporal. He claims: "The relief requested is injunctive in nature. Arthur also disclaims any attempt to challenge his conviction and sentence of death with this lawsuit, and instead focuses solely on the search for and release of physical evidence as described below for DNA and other testing." (Compl. ¶ 10.)[10] The statement foretells yet another § 1983 action or habeas petition resting on the presumptive, but not asserted here, claim that the testing will produce evidence of actual innocence requiring future court activity in new cases. The prospect of still more litigation following the instant case, after so long a delay, is highly prejudicial to the interests of the State in the finality and enforcement of its judgments.

The State would be further prejudiced by rewarding a dilatory and late-filing plaintiff with a stay. This case does not exist in a vacuum. Arthur's success here would encourage other death row inmates to wait late in the litigation day to file similar actions. Costs to the State are increased by the requirements of last-minute filings, expedited discovery, motion and trial schedules, and expedited appeals. Arthur seeks to establish such a precedent, but "the government has a strong interest in the finality of duly adjudicated criminal judgments . . . . Compelling interests - *e.g.*, guarding against a flood of requests, protecting the finality of convictions, and

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[10] Obviously, this statement in the complaint is offered to avoid the charge of a successive habeas action, but the remainder of the complaint is couched almost exclusively in terms of speculative actual innocence claims. *See Bradley v. Pryor*, 305 F.3d 1287 (11th Cir. 2002).

ensuring closure for victims and survivors - support the State's position in this case." *Grayson*, 460 F.3d at 1342 (citations omitted). The same interests are present here.

Weighing the relative harm to the parties, the weight of relevant considerations clearly favors the State and operates against the entry of a stay of execution.

C. Unreasonable Delay

Arthur was first convicted of Troy's murder in February 1982. With two successful appeals and resulting new trials in state court, Arthur was convicted a second time on May 13, 1987, and a third time on December 5, 1991.[11] After an execution date was set in 2001, Arthur filed his habeas petition on April 20, 2001, and received a stay of execution from the District Court of the Northern District of Alabama on April 25, 2001. *Arthur v. Haley*, 248 F.3d 1302, 1303 (11th Cir. 2001) (denying the motion to vacate the stay). Arthur has had fifteen years since his third conviction, six years after he filed his habeas petition, and more than four years since § 1983 was recognized in *Bradley*, 305 F.3d 1287, as the proper vehicle to obtain access to evidence for DNA testing. Moreover, DNA testing has been available since 1986, more than twenty years before Arthur sought testing in this action, a period which includes his last two capital trials. *See Grayson*, 460 F.3d 1328 at 1335. Arthur could have sought full access to test items for DNA, but he did not

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[11] The convictions were reversed on grounds not relevant to the issues under consideration here.

diligently pursue the procedure either at his second or third trial.

There are other reasons to find Arthur's delay unreasonable. In Arthur's habeas petition, two district judges and the Eleventh Circuit found not only that the evidence Arthur now seeks to test is insufficient to sustain the gateway claim of actual innocence, but that Arthur was not diligent in pursuing access to the evidence *before 2002.* It strains the meaning of plain language to say that an identical request five years later in 2007, under the guise of § 1983 and under yet another shadow of execution, can somehow be honestly construed as timely.

Bradley was decided on September 23, 2002. Eleven months later, on August 18, 2003, counsel for Arthur wrote defendant King seeking access to the evidence sought in this suit for DNA testing. (Compl., Ex. Twenty Six.) Exhibits six through twenty-five to the complaint contain a series of letters dated in November and December, 2003, requesting the evidence at issue from various state and local officials on behalf of Arthur. Obviously, Arthur was unsuccessful in his requests. He offers no explanation why he delayed nearly five years after the ruling in *Bradley*, and over three years after his demand letters, to bring this complaint on April 12, 2007. The court finds that Arthur's delay in bringing his § 1983 complaint is unreasonable, a factor that also weighs against him in a stay of execution analysis.

IV. CONCLUSION

No aspect of the equitable analysis of the entry of a stay of execution for a death row inmate in a § 1983 action favors Arthur. He demonstrates no likelihood of success on the merits, the relative harm factors weigh against him, and his delay in bringing the action is found to be unreasonable under the precedent of this circuit. Accordingly, the court must apply the strong equitable presumption against a stay of execution. The equities now lie with the State of Alabama to enforce its criminal judgment. The appropriate remedy is dismissal of the action.

For the foregoing reasons, it is ORDERED that the defendants' Motion to Dismiss (Doc. #8) is GRANTED and that this case is dismissed. An appropriate judgment will be entered.

DONE this 17th day of August, 2007.

/s/ W. Keith Watkins
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

THOMAS D. ARTHUR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 2:07-cv-319-WKW
	)	
TROY KING, *et al.*,	)	
	)	
Defendant.	)	

OPINION AND ORDER

Before the court is Thomas D. Arthur's Motion to Alter or Amend Judgment (Doc. # 18). For the reasons that follow, the court will DENY the motion.

Federal Rule of Civil Procedure 59(e) allows a party to file a motion to amend or alter the judgment of a court. *See* Fed. R. Civ. P. 59(e). "The decision to alter or amend a judgment is committed to the sound discretion of the district court." *Drago v. Jenne*, 453 F.3d 1301, 1305 (11th Cir. 2006) (citations omitted). "There are four basic grounds for granting a Rule 59(e) motion: (1) manifest errors of law or facts upon which the judgment was based; (2) newly discovered or previously unavailable evidence; (3) manifest injustice in the judgment; and (4) an intervening change in the controlling law." *Jacobs v. Electronic Data Sys. Corp.*, 240 F.R.D. 595, 599 (M.D. Ala. 2007) (Thompson, J.) (citing 11 Charles Alan Wright,

Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2810.1, at 124-27 (2d ed. 1995))

On August 17, 2007, the court granted the defendants' motion to dismiss. On August 27, 2007, Arthur timely filed his Motion to Alter or Amend Judgment.[1] In his motion, Arthur argues that a new unsworn statement from Ray Melson is "powerful" evidence of his innocence, that *Grayson v. King*, 460 F.3d 1328 (11th Cir. 2006) is factually distinguishable from his case, and that the court erred in finding that he unreasonably delayed in seeking DNA testing of the evidence compiled by the authorities. The court is not persuaded by Arthur's arguments for the following reasons.

Melson's Testimony

Arthur alleges that a new unsworn statement from Melson (Mot. Ex. D) provides "powerful evidence of [his] innocence." (Mot. at 1.) In the course of Arthur's post-conviction litigation, Melson has provided two affidavits; one affidavit alleging that Melson saw Arthur on the day of the murder (Mot. Ex. A), and the second recanting the first (Mot. Ex. B). His third statement allegedly sheds light on his previous inconsistencies. In his first affidavit dated August 2, 2002, Melson testified that Arthur visited Copper Mobile Homes of Decatur, Melson's employer, between 8:00 a.m. and 9:00 a.m. on the day of Troy's murder. Melson testified that he and Alphonso High spoke to Arthur "for about 20 to

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[1] Federal Rule of Civil Procedure 59(e) provides that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."

30 minutes." (Mot. Ex. A ¶ 2.) On September 20, 2002, Melson recanted his first affidavit. Melson recalled that he was on medication during the time he signed the first affidavit, and he "did not really remember what was in the affidavit, or if [he] even read it the day that [he] signed it." (Mot. Ex. B at 1.) Melson testified that he "cannot say with any certainty" that he saw Arthur on the morning of Troy's murder. (*Id.* at 2.) Now, in an attempt to explain why he recanted his first affidavit with his second, Melson's unsworn statement, dated August 22, 2007, alleges that he was on pain medication the day that he signed the *second* affidavit and was unaware of its exact contents at the time. Moreover, he alleges that he did indeed see Arthur on the morning of Troy's murder. Melson now claims, for the first time, that the day was memorable because he delivered a double-wide trailer to Birmingham, which was "unusual," and that "the trailer got stuck in the mud while [he] was transporting it . . . ." (Mot. Ex. D ¶¶ 12-13.)

For a number of important reasons, the court cannot credit the latest iteration of Melson's "fundamentally wounded" recollection.[2] The statement is unsworn and under ordinary circumstances would not be considered at all. More importantly, the statement creates more questions than it answers, not about Arthur's involvement in Troy's murder, but about the credibility of Melson. The effects of Melson's prescription drug use and abuse (used as an excuse in both retractions), his not coming forward at the time of any of the three highly

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[2] *Arthur v. Allen*, 459 F.3d 1310, 1311 (11th Cir. 2006).

publicized trials and subsequent death sentences, the addition of still more new facts,[3] and the ability to clearly remember an exact date and time over twenty-five years ago are but a few. The third statement actually diminishes the value of anything Melson may have to say to the point of no credibility at all. It is a repudiation of a repudiation. Under the circumstances, it adds zero to the DNA equation.

Even more telling, Melson's third statement comes one month shy of *five years since he repudiated his first affidavit.* The court cannot fathom, if this is in fact "powerful evidence of Mr. Arthur's innocence" (Mot. at 3.), why the statement did not surface one, two, three, or four years after the 2002 repudiation affidavit, or even as an exhibit filed with the complaint in April 2007. *See Lussier v. Dugger*, 904 F.2d 661, 667 (11th Cir. 1990) ("Motions, such as motions to amend, should not be used to raise arguments which could, and should, have been made before the judgment is issued." (citation and internal quotation marks omitted)).[4] The court can only conclude that this motion is a desperate last-minute effort in the shadow of an execution date to postpone or avoid that date.

Grayson

Arthur argues that the procedural safeguards afforded to Grayson were more adequate than those

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[3] Melson claims that the delivery of the double-wide trailer to Birmingham was unusual, and that the trailer got stuck in the mud. (*See* Mot. Ex. D ¶¶ 12-13.))

[4] Arthur's briefing throughout this case has argued the first version of Melson's story with no hint that a third version was in the wings.

afforded to himself. The court disagrees. Mr. Grayson "received a fair trial, a direct appeal, and both state and federal habeas proceedings and appeals." *Grayson*, 460 F.3d at 1341. Similarly, the procedural safeguards afforded to Arthur included "three trials and three convictions that resulted in death sentences (two convictions were reversed in state court proceedings); state and federal habeas proceedings; and a stay of execution." (Doc. # 14 at 15.) Moreover, Arthur argues that, unlike *Grayson*, he never received a review on the merits of his claims because the district court dismissed his habeas proceedings as untimely. Arthur creatively attempts to relitigate an already settled habeas issue. For the court to accept Arthur's argument, it must find that he tolled the statute of limitations for his habeas action.

Judge Edwin Nelson concluded, in a detailed opinion, that Arthur did not file his habeas petition within the one year statute of limitations. *See Arthur v. Haley*, Mem. of Op., No. CV01-N-0983-S, at 6 (N.D. Ala. Dec. 4, 2002). Subsequently, Judge Scott Coogler denied Arthur's motion to amend or alter the judgment of Judge Nelson. *See Arthur v. Haley*, Mem. of Op., No. 01-N-0983, at 5 (N.D. Ala. June 4, 2003). The Eleventh Circuit upheld the decisions in *Arthur v. Allen*, 452 F.3d 1234 (11th Cir.), modified on reh'g, 459 F.3d 1310 (11th Cir. 2006), and the United States Supreme Court refused to grant certiorari. *Arthur v. Allen*, __ U.S. __, 127 S.Ct. 2033 (2007). Arthur failed to persuade two district court judges, the Eleventh Circuit, and the United States Supreme Court of the validity of his argument. The court refuses to entertain an analysis of Arthur's previously unsuccessful argument.

Moreover, the fact that Arthur has been afforded significant procedural safeguards for his liberty interest differs from considerations of whether he took advantage of them.

Unreasonable Delay

Arthur avers that the court should not consider unreasonable delay in its analysis of his claims for two reasons: he had ineffective assistance of counsel and could not take advantage of DNA testing at his second and third trials, and the diligence analysis applied in Judge Nelson and Coogler's habeas opinions is not good law. As to Arthur's first argument, his claims of ineffective assistance of trial counsel have been litigated. *See Arthur v. State*, 711 So. 2d 1031 (Ala. Crim. App. 1996), *aff'd Ex parte Arthur*, 711 So. 2d 1097 (Ala. 1997). Moreover, these claims were not before the court in his § 1983 complaint for DNA testing.

As to Arthur's second argument, unreasonable delay is a necessary equitable consideration in determining whether to grant a stay of execution. *See Nelson v. Campbell*, 541 U.S. 637, 649-650 (2004). The court took notice of the dilatory actions of Arthur by referencing the *findings of fact* of Judges Nelson and Coogler, findings which were affirmed by the Eleventh Circuit. The question before this court was whether Arthur unreasonably delayed in seeking access to DNA testing, not whether he was diligent in securing an evidentiary hearing in his habeas action. The diligence analysis to which Arthur refers as "not good law" (Mot. at 7) is in reference to the latter point, not the former.

Having considered all Arthur's arguments and for the above reasons, it is ORDERED that Arthur's Motion to Alter or Amend Judgment (Doc. # 18) is DENIED.

DONE this 30th day of August, 2007.

/s/ W. Keith Watkins
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-13933

D.C. Docket No. 2:07-cv-319-WKW

THOMAS D. ARTHUR,

Plaintiff-Appellant,

versus

TROY KING,
Attorney General for the State of Alabama, in his official capacity,
BRYCE U. GRAHAM, JR.,
District Attorney for Colbert County, in his official capacity,
RONNIE MAY,
Sheriff for Colbert County, in his official capacity,
M. DAVID BARBER,
District Attorney for Jefferson County, in his official capacity,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

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(September 21, 2007)

Before BIRCH, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

Plaintiff Thomas D. Arthur is an Alabama death row inmate scheduled for execution by lethal injection on 27 September 2007. On 12 April 2007, Arthur filed a 42 U.S.C. § 1983 complaint in the United States District Court for the Middle District of Alabama seeking access to specific materials collected at the crime scene for DNA and other testing.

The United States Supreme Court denied Arthur's petition for writ of certiorari in his federal habeas action on 16 April 2007, and, on 17 April 2007, the State of Alabama ("Alabama") filed a motion with the Alabama Supreme Court to set an execution date. In this case, defendants Troy King, Bryce U. Graham, Jr., Ronnie May, and M. David Barber (collectively, "King") filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on 18 May 2007, arguing that Arthur's complaint failed to state a claim upon which relief could be granted.

On 22 June 2007, the Alabama Supreme Court granted Alabama's motion, and set the execution date for 27 September 2007. The district court subsequently granted King's motion to dismiss, Arthur v. King, No. 07-cv-319-WKW, 2007 WL 2381992 (M.D. Ala. Aug. 17, 2007) ("Arthur XX"), and denied Arthur's motion to alter or amend judgment, 2007 WL 2539962 (M.D. Ala. Aug. 30, 2007) ("Arthur XXI"). Arthur timely appealed and requested expedited briefing and a stay of execution

pending appeal. We granted expedited briefing and now affirm the district court's judgment dismissing Arthur's § 1983 action. We also deny his motion for a stay of execution pending appeal as moot.

I. BACKGROUND

The details of Arthur's offense are set forth in our opinion affirming the district court's judgment denying Arthur federal habeas relief. See Arthur v. Allen, 452 F.3d 1234 (11th Cir.) ("Arthur XV"), modified on reh'g, 459 F.3d 1310 (11th Cir. 2006) ("Arthur XVI"), cert. denied, ___ U.S. __ 127 S. Ct. 2033 (2007) ("Arthur XVII"). Briefly, in 1982, Arthur, while serving a sentence for murder in the second degree and assigned to a work release center, murdered Troy Wicker, the husband of one of Arthur's paramours, Judy Wicker, by shooting Wicker through the right eye, while he was asleep, with a .22 caliber pistol.

Arthur was indicted for murder, convicted, and sentenced to death by electrocution in 1982. His conviction and sentence were affirmed by the Alabama Court of Appeals, Arthur v. State, 472 So. 2d 650 (Ala. Crim. App. 1984) ("Arthur I"), but reversed by the Alabama Supreme Court because the trial court had improperly permitted evidence of Arthur's prior murder conviction. Ex parte Arthur, 472 So. 2d 665, 668-70 (Ala. 1985) ("Arthur II"). The case was remanded for a new trial. Arthur v. State, 472 So. 2d 670 (Ala. Crim. App. 1985) ("Arthur III"). In 1987, Arthur was again convicted and sentenced to death. His conviction was reversed, however, because of the admission of Arthur's statement to the police after he had invoked his right to remain silent.

Arthur v. State, 575 So. 2d 1165, 1171-75 (Ala. Crim. App. 1990) ("Arthur IV"), cert. denied, In re Arthur, 575 So. 2d 1191 (Ala. 1991) (per curiam) ("Arthur V"). In 1991, Arthur was indicted and convicted of murder for pecuniary gain. Arthur was sentenced to death in 1992. His conviction and sentence were affirmed. Arthur v. State, 711 So. 2d 1031 (Ala. Crim. App. 1996) ("Arthur VI"), affirmed, In re Arthur, 7 .1 So. 2d 1097 (Ala. 1997) ("Arthur VII"). He did not file a petition for writ of certiorari to the United States Supreme Court.

Approximately twenty–nine months later, in September 2000, Alabama filed a motion with the Alabama Supreme Court to set an execution date. In January 2001, Arthur filed a petition for postconviction relief with the state trial court. The petition, however, was dismissed as untimely because of a mandatory two–year limitations period required by Alabama Rule of Criminal Procedure 32.2(c), and that decision was affirmed. Arthur v. State, 820 So. 2d 886, 888-90 (Ala. Crim. App. 2001) (per curiam) ("Arthur VIII"), cert. denied, Arthur v. Alabama, 535 U.S. 1053, 122 S. Ct. 1909 (2002) ("Arthur IX"), The Alabama Supreme Court set execution date, Ex parte Arthur, 821 So. 2d 251 (Ala. 2001) ("Arthur X") for 27 April 2001.

On 20 April 2001, Arthur filed a federal petition for writ of habeas corpus. The district court granted a stay of execution. We denied a motion to vacate the stay, Arthur v. Haley, 248 F.3d 1302, 1303 (11th Cir. 2001) (per curiam) ("Arthur XI"), and the Supreme Court denied an application to vacate the stay of execution of sentence of death. Haley v. Arthur, 532 U.S. 1004, 121 S. Ct. 1676 (2001) ("Arthur XII"). The federal district court dismissed Arthur's habeas

petition, Arthur v. Haley, No. CV-01-N-0983-S (N.D. Ala. Dec. 4, 2002) ("Arthur XIII") and his motion to alter or amend the judgment, Arthur v. Haley, No. CV-01-N-0983-S (N.D. Ala. Jun 5, 2003) ("Arthur XIV"), but granted a certificate of appealability. We affirmed the district court's denial of habeas relief in 2006, Arthur XV, and the Supreme Court denied his petition for writ of certiorari on 16 April 2007, Arthur XVII. The Alabama Supreme Court subsequently set the date of execution.[1]

II. DISCUSSION

During the district court's consideration of Arthur's 2001 federal petition for writ of habeas corpus, Arthur moved for leave to conduct discovery related to his claim of actual innocence. Arthur XIII at 5; Arthur XIX at 2. He sought the clothing that Wicker was wearing on the day of the murder, the rape kit created that same day, the hair samples and wig recovered from Judy Wicker's car, the hair sample and vacuum sweepings recovered from the Wickers' residence, spent cartridge casings and a pillowcase found near Troy Wicker's body, the bullet recovered from Troy Wicker, and photographs of the crime scene. Arthur XIII at 5; Arthur XIV at 3; Arthur XV at 1247 n.9. The district court denied the request, finding that it would, at best, impeach Judy

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[1] In May 2007, Arthur also filed an action under § 1983 in the Southern District of Alabama, challenging Alabama's method of execution. The district court, however, granted Alabama's motion to dismiss based on laches, Arthur v. Allen, No. 07-0342, 2007 WL 2320069 (S .D. Ala. Aug. 10, 2007) ("Arthur XVIII"), and we affirmed, No. 07-13929(11th Cir. Sep. 17, 2007) (Arthur XIX").

Wicker's testimony but would not establish Arthur's actual innocence claim. Arthur XIII at 7; Arthur XIV at 5-7. We affirmed, noting that Arthur failed to satisfy the diligence requirement of 28 U.S.C. § 2254, failed to pursue the testing of the requested evidence during his three trials or during state court postconviction proceedings, and failed to demonstrate good cause for his failure to seek the evidence. Arthur XV at 1248. We also noted that "good cause for discovery cannot arise from mere speculation" and that the Arthur's claim that the discovery might prove that he was not the perpetrator was "not enough." Arthur XVI at 1311.

Arthur's § 1983 action sought access to the biological and other evidence used at his trial, and alleged that King's refusal to provide him with the evidence violated his Fourteenth Amendment right to due process, his Eighth Amendment right not to be subjected to cruel and unusual punishment, his right of access to the courts, and his clemency rights. The district court dismissed the § 1983 challenge, finding that Arthur's request could not be litigated without the entry of a stay of execution and that Arthur had failed "to overcome the strong equitable presumption against the grant of a stay." Arthur XIX, slip op. at 9, 2007 WL, 2381992 at *4. It concluded that Arthur had failed to demonstrate a likelihood of success on the merits, that prejudice to Alabama outweighed prejudice to Arthur, and that Arthur unreasonably delayed filing his § 1983 action. Id. at 21-25, 2007 WL 2381992 at *11-12.

On appeal, Arthur argues that the district court erred in dismissing his complaint and in refusing to alter or amend its judgment. He maintains that the district court erred in concluding that he was

provided procedural safeguards regarding a fair trial because his postconviction proceedings were dismissed as untimely and he has thus not received a review on the merits. He contends that it was error to apply a "strong equitable presumption against the grant of a stay" when no stay was sought and there was no showing that a stay was needed for his claims to be litigated. He maintains that the district court erred by concluding that he had failed to demonstrate a likelihood of success on the merits because DNA testing could identify the actual perpetrator. He argues that the district court failed to recognize, in its relative harm analysis, that Arthur seeks exculpation, and erred in concluding that he unreasonably delayed in filing his action. He also asserts that the district court erred in not crediting the newly discovered exculpatory evidence without holding an evidentiary hearing.

We review a district court's dismissal under Rule 12(b)(6) for failure to state a claim de novo, accepting the complaint's allegations as true and construing them in the light most favorable to the plaintiff Grayson v. King, 460 F.3d 1328, 1336 n. 5 (11th Cir. 2006) ("Grayson I"); Swann v. S. Health Partners, Inc., 388 F.3d 834, 836 (11th Cir. 2004). We will affirm only if the Rule 12(b)(6) motion establishes, beyond doubt, that there is no set of facts to support the plaintiff's claim which would entitle the plaintiff to relief. Spain v. Brown & Williamson Tobacco Corp., 363 F.3d 1183, 1187 (11th Cir. 2004).

Although a district court's decision to grant or deny equitable relief is reviewed for abuse of discretion, Preferred Sites, LLC v. Troup County, 296 F.3d 1210, 1220 (11th Cir. 2002); United States SEC v. Ginsburg, 362 F.3d 1292, 1297 (11th Cir.

2004), we review the underlying decisions regarding questions of law de novo and findings of fact for clear error. Preferred Sites, LLC, 296 F.3d at 1220. "A district court by definition abuses its discretion when it makes an error of law." Koon v. United States, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047 (1996).

A plaintiff may seek postconviction access to biological evidence for DNA testing as a § 1983 action, but must show that denial of such access "deprive[s] him of a federally protected right" in order to state a claim. Grayson I at 1336. In Grayson I, we held that "Grayson ha[d] no asserted constitutional right to [biological evidence for DNA testing] under the factual circumstances of the case," but left open the possibility that another § 1983 plaintiff might prevail. Id. at 1342–43.[2]

"[T]he equitable principles at issue when inmates facing imminent execution delay in raising their § 1983 . . . challenges are equally applicable to requests for both stays and injunctive relief" and are "not available as a matter of right." Williams v. Allen, ___ F.3d ___, 2007 WL 2368028 at *2 (11th Cir Aug. 21, 2007) (quoting Grayson v. Allen, 491 F.3d 1318, 1322 (11th Cir. 2007) ("Grayson II"), cert. denied, __ U.S. __, S. Ct. __ 2007 WL 2086662,

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[2] The facts in Grayson I established that (1) DNA testing was available as early as 1986, but that the test which Grayson wished to perform was not widely used until the mid-1990s; (2) the evidence sought was introduced at trial, and there was no claim that the evidence was suppressed by the prosecution or that Grayson was denied a fair trial; and (3) the DNA testing sought, even if exculpatory, could not show that he was actually innocent but only that another person was involved in the crime. Id. at 1335-36, 1337, 1339.

76 USLW 3049 (Jul. 26, 2007)). Those equitable principles include (1) "sensitiv[ity] to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts," (2) the plaintiffs satisfaction of "all of the requirements for a stay, including a showing of a significant possibility of success on the merits," (3) the application of "a strong equitable presumption against the grant of a stay where the claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay," and (4) protection of the "States from dilatory or speculative suits. Hill v. McDonough, ___ U.S. ___, ___, 126 S. Ct. 2096, 2104 (2006) (quoting Nelson v. Campbell, 541 U.S. 637, 649-50, 124 S. Ct. 2117, 2126 (2004). The strong interest of the State and the victims' families is in "the timely enforcement of a sentence", id. at __, 126 S. Ct. at 2104, which acquires "an added moral dimension" once post-trial proceedings finalize. Calderon v. Thompson, 523 U.S. 538, 556, 118 S. Ct. 1489, 1501 (1998).

A. Dismissal of Arthur's § 1983 Action for unjustifiable delay

Arthur contends that the district court erred by finding that he could not establish a reasonable likelihood of success on the merits and by applying a strong equitable presumption against the grant of a stay, because no stay was sought and there was no showing that a stay was needed for Arthur's claims to be litigated. He maintains that a denial based on the necessity for a stay was inappropriate because his action was filed before the Supreme Court denied

his petition for writ of certiorari regarding his federal habeas petition and before Alabama moved the Alabama Supreme Court to set his execution date. He contends that, at the time when he filed his complaint, his execution date was not imminent, and that it is unreasonable to set such a standard at a time after his complaint was filed.

In his § 1983 complaint, Arthur sought access to (1) Judy Wicker's clothing, (2) Judy Wicker's rape kit, (3) a wig and hair samples collected from Judy Wicker's car, (4) vacuum sweepings from the Wickers' den, (5) hair samples taken from a shoe, (6) spent cartridges, a bullet, and a pillow case taken from the Wickers' home, and (7) crime scene photographs that were admitted at trial.[3] He maintained that DNA testing "could" show that someone else had assaulted Judy Wicker and murdered her husband, that Judy Wicker's testimony regarding him wearing a wig was a lie, and that someone other than Arthur was at the Wicker residence on the morning of the murder. R-I at 10.[4]

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[3] Arthur presents no argument regarding the shell casings, pillowcase, bullet taken from the crime scene or the crime scene photographs on appeal. We, therefore, treat these issues as abandoned. United States v. Ford, 270 F.3d 1346, 1347 (11th Cir. 2001) (per curiam).

[4] Each of these claims was also presented in his 2001 habeas petition and his 2002 motion for leave to conduct discovery and considered by the district court. As to Judy Wicker's clothing, the district court concluded that there was no basis in the record for Arthur's belief that the blood on her clothing belonged to her assailant, Arthur XIII at 7 n.6, or to anyone other than Judy Wicker, Arthur XIV at 5. As to the rape kit, the vacuum sweepings, and the hair samples taken from the residence, the district court concluded that merely showing that

Relying upon the analysis set forth in Rutherford v. Crosby, 438 F.3d 1087, 1092 (11th Cir.), vacated on other grounds, Rutherford v. McDonough, U.S, 126 S. Ct 2915 (2006) ("Rutherford I"), Hill v. McDonough, __ U.S.__, __, 126 S. Ct. 2096, 2104 (2006) and Grayson II, the district court found that Arthur had unreasonably delayed in filing his § 1983 action and that, absent a stay of execution to which he was not entitled, his requests could not be litigated. Arthur XX, slip op. at __, 2007 WL 2381992 at *4, 13.

In considering the dismissal of a § 1983 challenge, courts are to apply equitable principles which mandate dismissal when the plaintiff "delayed unnecessarily in bringing the claim, . . . knowing full well that the discovery, evidentiary hearing, and decision on the merits that he demands could not

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another person was with Judy Wicker or in her home at some unspecified time does little to support her testimony or to further impeach her testimony about Arthur's involvement and, at best, would provide further information about Judy Wicker's veracity which was amply covered during the state trial, and that Arthur did not offer any reason to believe that testing the rape kit would help show that he was more likely than not actually innocent. Arthur XIII at 7 and n.6; Arthur XIV at 3, 5-7. As to the wig and hair samples, the district court found that expert testimony at trial indicated that the hair samples were of African American origin, and that Arthur provided no support for his speculation that different tests could impeach Judy Wicker's testimony. Arthur XIII at 7 and n.6. In denying his motion to alter or amend the judgment, the district court concluded that, although no explanation had been offered for the hair found in the car or for the lack of the hair in the wig, the findings were not inconsistent with Judy Wicker's testimony and Arthur offered no reason to believe that an examination would reveal anything other than what was already established. Arthur XIV at 5-6.

possibly be accomplished" within the short period of time between filing and the scheduled execution date. Rutherford v. McDonough, 466 F.3d 970, 974 (11th Cir. 2006) ("Rutherford II") (also citing and quoting Hill, __ U.S. at __, 126 S. Ct. at 2104) ("The federal courts can and should protect States from dilatory . . . suits" or "suits . . . filed too late in the day."); see also Grayson II at 1321 ("[C]ourts considering dismissal of a dilatory § 1983 suit seeking injunctive relief should recognize the 'strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay" (quoting Rutherford, 466 F.3d at 974 (quoting Hill, __ U.S. at __, 126 S. Ct. at 2104))); Williams, __ F.3d at ___, 2007 WL 2368028 at *4 ("[T]he district court did not abuse its discretion in dismissing Williams's § 1983 action due to his unnecessary delay, especially given the strong presumption against the grant of equitable relief.").

As the district court concluded, Arthur is unable to defeat King's motion to dismiss. Arthur's case would clearly take additional time to fully litigate this claim. See Grayson II at 1326 n.4 (noting that Grayson's § 1983 action seeking access to physical evidence "took over four years to proceed from the district court through the Supreme Court's denial of certiorari review."). Arthur has not argued that the evidence was suppressed by the prosecution during his trial or that his trial was unfair as a result of the suppression of evidence, and there was ample evidence linking Arthur to Troy Wicker's murder. He is also unable to establish that the DNA testing would exonerate him of murder. The numerous courts which have reviewed his claims have provided

him with procedural safeguards to protect his liberty interest. This action, seeking DNA testing of evidence, was filed twenty-five years after the crime, fifteen years after his third conviction and death sentence, nine years after the conclusion of his appeals on direct review, five years after the conclusion of his state postconviction proceedings, six years after the initial filing of his federal habeas petition, and four days before the Supreme Court denied his petition for writ of certiorari of his federal habeas petition. Further, a plaintiff has been able to see evidence through a § 1983 action for at least five years.[5] Arthur is thus unable to show that he is entitled to the postconviction access to evidence under Grayson I.

Arthur is also not entitled to a stay. The evidence which he seeks is the same evidence that was considered by the district court during his habeas corpus petition and which will not clearly exonerate him. He is unable to show a likelihood of success on the merits and the balance of the equities weigh against the grant of a stay. Arthur sought neither a motion to expedite the proceedings nor a motion to stay his execution in the district court. The motions which he has filed with us, to expedite the briefing schedule and to stay his execution, are admissions that expedited consideration and a stay are

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[5] In 2002, we held that a prisoner could seek an order compelling the prosecution to produce evidence for DNA testing through an action filed pursuant to § 1983. Bradley v. Pryor, 305 F.3d 1287, 1290 (11th Cir. 2002), cert. denied, 538 U.S 999, 123 S. Ct. 1909 (2003). We also note that, during oral argument on Arthur's federal habeas petition in 2004, Arthur's counsel was reminded that she could seek access to physical evidence in a § 1983 claim.

necessary. With a 27 September 2007 execution date, the § 1983 action could not be fully litigated on the merits absent a stay of execution. Although "the equitable considerations in each case are naturally different," even if Arthur would have been entitled to a decision on the merits if he had brought his suit in time to allow consideration of the merits without the entry of a stay, the strong presumption against a stay operates against him. See Jones v. Allen, 485 F.3d 635, 641 n. 4 (11th Cir.), cert. denied, __ U.S. __, 127 S. Ct. 2160 (2007).

B. Denial of Arthur's motion to alter or amend the judgment

After the district court had dismissed his complaint and Arthur had appealed that dismissal, Arthur timely filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) in the district court. In this motion, he argued, inter alia, that a new affidavit from Ray Melson provided evidence of Arthur's innocence. In support of this motion, he submitted three affidavits from Melson and an affidavit from Stephen Gustat. The affidavits from Melson provide Arthur with an alibi, recant that alibi, and repudiate the recantation.

The district court discredited Melson's third affidavit because it was unsworn, created more questions than it answered regarding Melson's credibility, "actually diminishe[d] the value of anything Melson may have [had] to say to the point

of no credibility at all," and was filed only as "a last-minute effort" because it was not filed earlier.[6]

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[6] The district court explained,

> [d]uring the course of Arthur's postconviction litigation, Melson . . . provided two affidavits; one affidavit alleging that Melson saw Arthur on the day of the murder, and a second recanting the first. His third statement allegedly sheds light on his previous inconsistencies. In his first affidavit dated August 2, 2002, Melson testified that Arthur visited Copper Mobile Homes of Decatur, Melson's employer, between 8:00 a.m. and 9:00 a.m. on the day of Troy's murder. Melson testified that he and Alphonso High spoke to Arthur "for about 20 to 30 minutes." On September 20, 2002, Melson recanted his first affidavit. Melson recalled that he was on medication during the time he signed the first affidavit, and he "did not really remember what was in the affidavit, or if [he] even read it the day that [he] singed it." Melson testified that he "cannot say with any certainty" that he saw Arthur on the morning of Troy's murder. Now, in an attempt to explain why he recanted his first affidavit with his second, Melson's unsworn statement, dated August 22, 2007, alleges that he was on pain medication the day that he signed the *second* affidavit and was unaware of its exact contents at the time. Moreover, he alleges that he did indeed see Arthur on the morning of Troy's murder. Melson now claims, for the first time, that the day was memorable because he delivered a double-wide trailer to Birmingham, which was "unusual," and that "the trailer got stuck in the mud while [he] was transporting it. . . ." Arthur XXI, slip op. at ___, 2007 WL 2539962 at *1.

The district court noted a "number of important reasons" for not crediting Melson's third affidavit: (1) "it is unsworn," and (2) "creates more questions than it answers about the credibility of Melson," including (a) "[t]he effects of Melson's prescription drug use and abuse (used as an excuse in both retractions)", (b) his not coming forward during any of the Arthur's "three highly publicized trial and subsequent death sentences," (c) "the

Arthur XXI, slip op. at __, 2007 WL 2539962 at *2. It concluded that Arthur's argument that he was not afforded significant procedural safeguards was considered on habeas, that he failed to raise his ineffective assistance of counsel claim in his initial § 1983 complaint, and that the court had properly considered Arthur's delay in dismissing his complaint. Id. at __, 2007 WL 2539962 at *2-3.

We review the denial of a Rule 59 motion for abuse of discretion. Drago v. Jenne, 453 F.3d 1301, 1305 (11th Cir. 2006). "The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact." In re Kellogg, 197 F.3d 1116, 1119 (11th Cir. 1999). "[A] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." Michael Linet, Inc. v. Village of Wellington, Fla., 408 F.3d 757, 763 (11th Cir. 2005).

Arthur cannot show that the district court abused its discretion in denying his motion to alter or amend the judgment. Because Melson's affidavit was

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addition of still more new facts," such as the delivery of the double-wide trailer and that it got stuck, and (d) Melson's "ability to clearly remember an exact date and time over twenty-five years ago." Id. at __, 2007 WL 2539962 at *2.

Attached to King's brief is a fourth affidavit of Melson (which was not provided to the district court). King Br. at Exh. A. In this sworn affidavit dated 5 September 2007, Melson states that, although he "remember[s] seeing . . . Arthur on one morning around the time of the . . . Wicker murder," he "do[es] not . . . remember what day of the week it was, exactly what time of day it was," or whether he was "100% sure that [he] saw . . . Arthur on the day of the murder" and explained that "[i]t is simply hard to remember everything that happened in 1982. Id.

unsworn, it was not properly considered by the district court. See Holloman v. Jacksonville Housing Auth., No. 06-10108, slip op. at ___, 2007 WL 245555 at *2 (per curiam) ("unsworn statements, even from pro se parties, should not be consider[ed] in determining the propriety of summary judgment") (quoting Gordon v. Watson, 622 F.2d 120, 123 (5th Cir. 1980) (per curiam)). To the extent that it was considered, however, it was not newly discovered. It could have been discovered during the five years after Melson had repudiated his first affidavit, and filed with the complaint. As the district court held, by repudiating a repudiation of his initial affidavit, Melson's third affidavit raised more questions, at least regarding his credibility, than it answered.

III. CONCLUSION

We conclude that the district court did not abuse its discretion in dismissing Arthur's § 1983 action, especially given the strong presumption against the grant of equitable relief. There was no justification for Arthur's failure to bring his request for physical evidence for DNA testing earlier to allow sufficient time, for full adjudication on the merits of this claim. The district court also did not abuse its discretion in denying Arthur's motion to alter or amend the judgment based on newly discovered evidence. Accordingly, the district court judgment of dismissal is AFFIRMED. Arthur's motion for a stay of execution pending appeal is DENIED as moot.

BARKETT, Circuit Judge, concurring in result:

I agree that Arthur is not legally entitled to relief on this claim.